

Before the
Federal Communications Commission
Washington, D.C. 20554

APR 18 2006

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Second Periodic Review of the Commission's) MB Docket No. 03-15
Rules and Policies Affecting the Conversion to)
Digital Television)

To: Marlene H. Dortch, Secretary
Attention: The Commission

Opposition to Request of WHNT-DT for Preservation of Maximized Service Area

ETC Communications, Inc. ("ETC"), licensee of WYLE(TV), Channel 26, and permittee of WYLE-DT, Channel 20, Florence Alabama, respectfully submits this Opposition to New York Times Management Services' pleading styled *Request of WHNT-DT for Preservation of Maximized Service Area* (the "Request"). The New York Times Management Services (the "New York Times") is the licensee of WHNT-TV, Channel 19, and WHNT-DT, Channel 59, Huntsville, Alabama.

The Request Should be Dismissed as a Premature Petition for Reconsideration

1. The New York Times posits that the Commission must take the extraordinary step of preserving WHNT-DT's maximized digital facilities on Channel 19, despite the fact that WHNT-DT would cause interference to WYLE-DT's authorized facilities on Channel 20 that exceeds by more than 60 times the allowable limits under the Commission's rules. The Media Bureau has twice rejected the New York Times' proposal by denying its First Round Channel Election and its First Round Conflict Decision proposal. See BIRECT-20050210AQQ and BFRCT-20050815ADO, respectively. The Bureau found the same problems with the New York Times' Second Round Channel Election and it has filed a Second Round Conflict Decision

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proposal specifying operation on Channel 19 with its replication facilities after the digital transition. See BSRECT-20051031ABL and BSRCT-20060403BST, respectively. The Request is a premature petition for reconsideration of the Media Bureau's disapproval of the New York Times' Second Round Channel Election, as the Bureau has yet to rule on the submission, as such the Request should be summarily dismissed.

2. In reality, the Request is the New York Times' latest effort to bully the Media Bureau, and now the Commission, into authorizing a significant degradation of WYLE-DT's service area for the sole reason the New York Times wishes it so. ETC respectfully requests that the Commission dismiss the New York Times' outrageous proposal as premature.

**There is No Legal Basis Justifying the Dramatic Negative Impact
The New York Times' Proposal Would Have on WYLE-DT**

3. Should the Commission consider the Request despite its procedural failings, ETC will address the content of the document. The Commission has stated that a station's digital channel election must not cause "more than tolerable new interference (i.e., in this context, 0.1 percent in addition to existing interference)." See *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order*, 19 FCC Rcd 18279, para. 56 (2004) (the *Second Periodic Review*). A licensee that has an allotted digital channel that is out-of-core and its analog channel is in-core (which is the case with WHNT-TV) will be allowed to exceed the 0.1 percent interference standard "on a limited basis." *Id.* Indeed, the Bureau "intends to approve in-core elections if they do not cause more than 2.0% additional interference to other stations (*based on their DTV replication facilities, not their maximized facilities*)." See *DTV Channel Election: First Round Conflict Decision Extension And Guidelines For Interference Conflict Analysis, Public Notice*, DA 05-2233, 20 FCC Rcd 13415 (2005) ("*DTV Public Notice*") [emphasis added]. However, the Commission was "concerned...that such

operations not cause substantial interference to existing DTV service." *Second Periodic Review*, para. 56. To avoid substantial interference to other DTV allotments, the Commission may ask a station to operate at decreased power, "even if this would preclude that station from operating with full replication facilities." *Id.*

4. The New York Times statements that the Commission **must** preserve WHNT-DT's maximized service area is a gross mischaracterization of the Commission's digital television maximization policy. It is obvious that no station is guaranteed operation with its maximized facilities, since the Commission can require a station in WHNT-DT's situation to operate with less than its replication service area. A licensee "allotted an out-of-core DTV channel will be afforded the opportunity for full *replication* facilities on an in-core DTV channel, unless they choose to accept less." *Second Periodic Report*, para. 55. However, no such opportunity is afforded a station like WHNT-DT to operate with maximized digital facilities. The New York Times knows this full well as it has filed its Second Round Conflict Decision form specifying replication facilities on Channel 19.

5. The New York Times attempts to cast the Request in terms of relieving confusion as to the service area of WHNT-DT post-digital transition, which is a meaningless and misleading argument. There is no confusion here. WHNT-DT's maximized facilities cause unacceptable interference with two DTV allotments; 6.1 percent to WYLE-DT and 1.3 percent to WDBB-DT, Bessemer, Alabama.¹ On the other hand, WHNT-DT's replication facilities do not pose any interference concerns to other stations, including WYLE-DT. And finally, there are no channels on which WHNT-DT's can operate its maximized facilities that satisfy the Commission's 0.1 percent interference standard. *See Request*, Attachment A, Technical Exhibit, pg. 5.

¹ *See Request*, Attachment A, Technical Statement, pg. 1. WGCL-DT, Atlanta, Georgia also received 0.3 percent interference, but the New York Times has reached a settlement agreement with the licensee of WGCL-DT to accept this degree of interference.

6. The New York Times offers seven alternative channels for WYLE-DT to move to from its allotted Channel 20 so that WHNT-DT may operate with maximized facilities. All but one of the channels would cause WYLE-DT to receive unacceptable interference, from a range of interference up to 12.8 percent. *See Request, Attachment A, Technical Statement, pg. 3.* The New York Times includes Channel 20 in the list of channels that supposedly are available to WYLE-DT to show that it would receive 6.2 percent interference on Channel 20 after the digital transition. What the New York Times **does not** say is that the 6.2 percent interference WYLE-DT would receive after the digital transition on Channel 20 is from WHNT-DT's **maximized** facilities. The fact is that WYLE-DT will not receive any interference on Channel 20 after the digital transition because WHNT-DT will not be operating at maximized facilities. The New York Times has no support for its ridiculous demand that WYLE-DT relocate its digital channel and accept some a substantial degree of additional interference.

7. The fact that WYLE-DT is not operating is unavailing to the New York Times. The Commission stated that its "interference conflict analysis...will determine whether and to what extent an elected in-core NTSC channel would cause interference to an existing or *proposed* in-core DTV channel." *See Second Periodic Review, para. 53* (emphasis added). The fact that WYLE is not yet transmitting in DTV is irrelevant. The New York Times' argument that DTV stations not yet on the air have no right to be protected from interference in excess of 2.0 percent is without any support in the Commission's exhausting decision-making process in the complex digital transition process, and rightly so. The Commission concluded that additional interference that exceeds 0.1 percent is *intolerable*. The New York Times has repeatedly argued that WHNT-DT's maximized facilities should be allowed to cause 6.1% interference to WYLE-DT, which

under any estimation would be considered substantial interference and its request fails to pass muster on its face.

Status of Construction of WYLE-DT's Facilities

8. The New York Times tries to paint an unflattering portrait of ETC and its efforts to construct facilities for WYLE-DT. Based on nothing more than mere conjecture, the New York Times postulates that ETC may never build facilities for WYLE-DT. In fact, WYLE has met every construction deadline set by the Commission and has complied with every DTV mandate.² ETC has been granted an extension of the construction permit for WYLE-DT and a request to extend that extension is pending before the Commission. *See* BEPCDT-20041124ABU and BEPCDT-20050714ACE, respectively. The New York Times implies that ETC has somehow failed to diligently pursue the extension request. *See* Request, pg. 11. Then it makes the unseemly statement that the only thing that ETC has done since the extension request was filed is to report the death of the owner of the station. *See* Request, FN 23. The New York Times' statements belittle the conscientious effort ETC's principals have made to construct WYLE-DT's facilities.

9. ETC was owned and operated by Les White and his wife, Karen Snead-White. Mr. White bought WYLE out of bankruptcy more than 12 years ago, and he ran the station, along with his wife until his death. WYLE is the only independent full power television station in the State of Alabama. WYLE provides a wealth of unique programming that is specifically tailored to its community.

10. Unfortunately, Mr. White passed away on December 14, 2005. Mr. White worked diligently until his death to construct WYLE-DT, and his efforts resulted in clearing most of the

² It is Commission policy that a grant of a construction waiver is considered as having met the May 2002 deadline for completion of commercial DTV facilities. *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Memorandum Opinion and Order of Reconsideration*, 16 FCC Rcd 20594 (2001).

impediments to completing construction. Mr. White's wife, Karen Snead, as executrix of Mr. White's estate, is continuing her husband's work to construct WYLE-DT. However, Mrs. Snead has had a number of affairs to contend with in the aftermath of her husband's death and the last impediments to WYLE-DT's construction have yet to be cleared. As noted, a second extension application is pending before the Commission.

11. The only obstacle remaining before the completion of construction of WYLE-TV's digital facilities is the removal of three previously unknown liens on the property that will serve as WYLE-DT's tower site and that will serve as the security for a commercial loan to complete construction. Before ETC was to close on the loan, the lender discovered the previously unknown liens. These liens have prevented ETC from receiving the necessary financing to complete the construction of WYLE-DT's facilities. ETC has hired local attorneys to handle this matter and they are diligently working to satisfy these liens. In fact, the attorneys have already cleared one of the liens. Once the liens have been removed, Mrs. Snead will be able to close on the loan and complete construction of WYLE-DT's digital facilities.

Settlement Discussions are Not Relevant

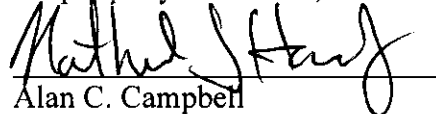
12. Settlement discussions between the parties, to the extent that there have been any, have no relevance in relation to the Request. However, to the extent that the New York Times suggests bad faith on the part of ETC, it should be noted that the New York Times first attempt at negotiations came two days before the First Round Conflict Decision deadline, and was an offer of \$3,000. ETC understandably declined the offer.

Conclusion

There is no justification for the incredible amount of interference the New York Times wants to force on WYLE-DT. If the Commission were to grant the Request, 6.1 percent

interference will by default become the new interference standard in the digital environment. This was clearly not envisioned in the *Second Periodic Review* or the *DTV Notice*, or any other carefully crafted Commission decision relevant to the DTV conversion process. While ETC has encountered difficulties in constructing facilities for WYLE-DT, not the least of which is the untimely passing of the station's principal owner, ETC has complied with the Commission's rules and is striving to complete construction of the digital facilities as soon as possible. The Media Bureau has declined to accept the New York Times proposal on two occasions. Nothing presented in the Request would support reversing these decisions. For the foregoing reasons, ETC respectfully requests that the Request of WHNT-DT for Preservation of Maximized Service Area be summarily dismissed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Nathaniel J. Hardy", is written over a horizontal line.

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Nathaniel J. Hardy

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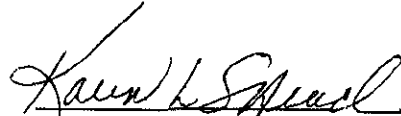
Washington, D.C. 200036

Counsel for ETC Communications, Inc.

April 18, 2006

DECLARATION OF KAREN SNEAD

I have reviewed the information in the preceding Opposition to Request of WHNT-DT for Preservation of Maximized Service Area and I declare that the information contained in the Opposition is true and correct to the best of my knowledge, information and belief.

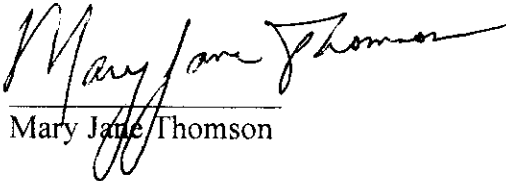

Karen Snead, Executrix
Estate of Lester W. White

CERTIFICATE OF SERVICE

I, Mary Jane Thomson, hereby certify that on this 18th day of April 2006, copies of the foregoing Opposition to Request of WHNT-DT For Preservation of Maximized Service Area have been served by hand delivery or first-class United States mail, postage prepaid, upon the following:

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Mary Jane Thomson